No. 15,789

United States Court of Appeals

For the Ninth Circuit

HELEN MAY GARDNER GLASER and GEORGE R. GARDNER,
Appellants,

vs.

FRANCES SHENK HESTER, also known as Frances Shenk Hester Gardner and WILLANE HESTER HAYNES,
Appellees.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

I.

CONTESTED ISSUES.

There are two issues involved in this appeal. Briefly, these are: (1) the admissibility of the evidence and testimony offered by the Appellants and excluded by the District Court, and (2) the correctness of the District Court's ruling sustaining Appellees' motion for a directed verdict. Appellees seek to meet these issues "head on" but we believe they have not effectively challenged either the reasoning or the authority contained in Appellants' principal brief.

II.

THE DISTRICT COURT ERRED IN RESTRICTING THE DEATH CERTIFICATE (EXHIBIT O-1) BY COVERING THE WORD "SUICIDE".

In support of the District Court's ruling excluding the word "suicide" from the death certificate (Exhibit O-1), Appellees cite *People v. Proctor,* 108 Cal. App. (2d) 739, 239 Pac. (2d) 454. This case is not controlling and is distinguishable. In *Proctor,* a death certificate containing the word "homicide" was offered to establish probable cause on a preliminary hearing for murder and upon which an order of commitment was to be issued. The Court held that the inclusion of the word "homicide" was intended as an opinion only and as such could not be considered as a "fact" which would establish a prima facie case of homicide. Since this was a criminal proceeding, strict compliance with the rule would be required. In a civil proceeding, the rule is to the contrary. In the *Estate of Lenci,* 106 Cal. App. 171, 288 Pac. 841, a death certificate was admitted in evidence where the issue involved mental competency. It was contended that this was an error because the certificate was not in proper form. The Court stated (page 175):

> ". . . A death certificate from the bureau of vital statistics, when properly certified, is *prima facie* evidence in all courts of the evidence therein stated. (Sec. 15 of an act approved March 18, 1905, as amended in 1911, Stats. 1911, p. 287.) If the death certificate is not in proper form it should not be used as authority for burial, cremation or disinterment purposes, but this would not

interfere with its introduction into evidence as *prima facie* proof of its contents."

In the case of *Bryson v. Manhart,* 11 Cal. App. (2d) 691, 54 Pac. (2d) 778, a death certificate was admitted to establish the cause of death in a case involving a transfer of property in fraud of creditors. The death certificate recited "Gun shot wound of brain, suicidal." At page 696, the Court stated:

"The findings are silent on the question whether decedent died by his own hand and defendants now contend that it was not established that decedent took his own life. Many circumstances were shown in evidence indicating suicide. A certificate from the registrar of vital statistics was presented certifying to the coroner's certificate of death in which the cause of death is given as follows: 'Gun shot wound of brain, suicidal.' The certificate was evidence of the facts therein stated. (Stats. 1915, p. 575; *Estate of Lenci,* 106 Cal. App. 171 [288 Pac. 841]; *Robinson v. Western States Gas & Elec. Co.,* 184 Cal. 401 [194 Pac. 39].) No contrary showing was made."

Compare, also:

Estate of Wolleb, 56 Cal. App. (2d) 488, 132 Pac. (2d) 864.

Whether a death certificate is admissible in evidence depends upon the facts in each case and the purpose for which it is sought to be introduced. It depends, also, upon whether it is an official record. Official records are an exception to the "hearsay" rule because it is assumed that these records are made

under the sanction of an oath of office. This distinguishes *Cropper v. Titanium Pigment Company,* (C.C.A. 8th Cir. 1931), 47 Fed. (2d) 1038, and the other cases cited under point 6(a) in Appellants' principal brief, and the case of *United States v. Johnson,* 8th Cir., 72 Fed. (2d) 614. In *Johnson* the basis of the ruling excluding the death certificate was the fact that it was not an official record but a record incidentally lodged with an official agency.

III.

THE DISTRICT COURT UNDULY RESTRICTED THE ADMISSIBILITY OF EVIDENCE CONCERNING THE NATURALNESS OF THE DISPOSITIVE ACT.

Appellants contend that the trial Court unduly restricted the evidence concerning the attitude of the deceased veteran towards his children. Appellees attempt to meet this argument by claiming (1) that they admitted the deceased veteran's love for his family, and (2) that the letters were hearsay.

With respect to Appellees' first contention, it is sufficient to say that such an admission could not present the true picture between the deceased veteran and his family. The naturalness of the disposition of property is not determined by the single factor that the one disposing of the property may love another but by many diverse factors. In *Taylor v. United States* (1953), 113 Fed. Supp. 143, the contest was between a wife and father. In *Metropolitan Life In-*

surance Company v. Anderson (1951), 101 Fed. Supp. 808, the contest was between a wife and a mother. If the evidence were limited to the admission that the veterans in those cases loved their respective spouses or parents, it is doubtful if the issue of incompetency could be resolved.

Much more is required to determine the naturalness of a dispositive act. The actions of the persons, the kind of lives they lead, the closeness with which a relationship is maintained, the concern for the welfare of the person, and many other similar factors are necessary for the proper determination of this issue. To say as the trial Court did:

> "It is agreed he had a mother, he had a father, he had one wife, and he had two children and then he had no wife, and then he had a wife . . ."

is a summary disposition of the matter.

The second contention that these letters are hearsay is not sustained by authority. In *Hawkey v. United States,* 108 Fed. Supp. 941, the issue was whether the person to whom the letters were written stood in *loco parentis* to the deceased veteran. On this issue letters showing affection or otherwise are clearly hearsay. But the letters which a person writes to indicate his concern for the welfare of his children or acknowledges an intention to take care of them, and the manner in which he plans this intention to be carried out are admissible. This is clearly established by the case of *Littlefield v. Littlefield* (C.A. 10th Cir. 1952), 194 Fed. (2d) 695, cited in Appellees' principal brief.

IV.

THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT THE VETERAN WAS INCOMPETENT AS OF THE DATE OF DISPOSITIVE ACT DOES NOT CONSTITUTE A LIMITATION ON THE ADMISSIBILITY OF EVIDENCE OF CONDUCT PRIOR TO THE DATE OF SUCH ACT.

Appellees "peg" their argument that the trial Court properly sustained the motion for a directed verdict on two abstract principles of law which, though correct, lend no weight to their argument nor force to their reasoning. Mental incompetency is a question of fact to be determined by the Court or jury. To guide them in making a determination of this fact, evidence is required. The extent to which such evidence is admissible is not dependent upon the principle that a person challenging the validity of a document on the ground of mental incompetency must establish such incompetency as of the date of the challenged document. The quotation from Appellants' principal brief (set forth in page 11 of the Appellees' brief) that "the test, however, is not whether Gardner was mentally incompetent on April 30, 1951" is taken out of context. It is true that this was the ultimate issue to be decided, but as we set forth in our principal brief, the issue on this appeal is whether the evidence is of such a nature and of such sufficiency as would enable a jury to draw an inference of mental incompetency as of that date, and had the issue been submitted to the jury, and had the jury so found, there would then be presented a question of whether the evidence supported such a finding. As was said in the case of *Estate of Lenci,* 106 Cal. App. 171 at page 177:

"Unsoundness of mind cannot always be proved by one statement, one circumstance or by one witness, but often rests upon seemingly slight but numerous circumstances, which when 'taken together, carry conviction of mental unsoundness.' (28 R. C. L. 98, and cases cited.) Incompetency need not be proved by direct evidence, but acts, conduct, statements, both before and after, may be the determining factor *though no evidence be introduced of the exact condition of the testator's mind upon the day of the making of a will.* (Estate of Johnson, 72 Cal. App. 670, [237 Pac. 816].) . . ." (Italics supplied.)

The evidence admitted, together with the evidence and testimony erroneously excluded, was sufficient to require the issue of mental competency to be resolved by the jury. Appellants in their principal brief have analyzed the evidence. They have shown that the deceased veteran was greatly concerned about the welfare of his children. They have shown the relationship between the deceased veteran and his family; that it was a normal relationship between parent and children; they have shown that the Appellee, Frances Shenk Hester, as of the date of the purported change of beneficiary, was not the wife of the deceased veteran; that there was no obligation of support; that the relationship was tenuous, even psychotic, and that if there was a degree of intimacy, it was predicated upon an illicit relationship. It is interesting to note that when the proposed change in beneficiary was executed, the secondary beneficiary named was the daughter of Mrs. Hester, a person apparently as old

as the deceased veteran, one with whom there was no relationship and to whom, upon any analysis of record, there was a complete absence of motivation which would cause the deceased veteran to provide for her. Here again, Appellees cite many cases in support of an abstract principal of law that "a mere scintilla of evidence is not enough to require the submission of an issue to the jury". The question before us in this case is whether the evidence offered and admitted presented more than a scintilla of evidence. We respectfully contend that it does.

CONCLUSION.

For the reasons stated, Appellants respectfully contend that the judgment should be reversed and remanded to the District Court with directions to grant Appellants a new trial.

Dated, Sacramento, California,
May 29, 1958.

Respectfully submitted,
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